FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS BRAXTON,
Petitioner,

v.

UNITED STATES,
Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. MR. BRAXTON DID NOT AGREE TO FACTS THAT SPECIFICALLY ESTABLISH THE MORE SERIOUS OFFENSE OF ATTEMPTED MURDER

The government recognizes that a "stipulation" is commonly understood as referring to "an agreement between attorneys." Brief for United States at 15. Lacking any indication on the record of an agreement between the attorneys in this case, the government attempts to transform Mr. Braxton's qualified acknowledgment of the government's factual proffer into an agreement between the parties. Thus, the government's brief is replete with

such statements as: Mr. Braxton "agree[d] to" the government's proffer (Brief for United States at 21), and suggests that there was "an agreement entered into" with respect to the government's proffer. *Id.* at 24.

The Court should not be led astray by these references. Subject to one crucial qualification, Mr. Braxton acknowledged the truth of the government's factual proffer in support of the guilty pleas to assault on deputy marshals (count two) and use of a handgun (count three). Although he acknowledged those facts, the suggestion that there was an "agreement entered into" is simply not true. The record discloses no agreement of any kind either between attorneys or between parties, and both lower courts found that there was no plea agreement in this case. J.A. 77, 95. The district court found in addition that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77.

If Mr. Braxton was going to agree to anything, it was that he did not attempt to kill the marshals, for during the Rule 11 hearing, defense counsel emphasized that Mr. Braxton did not admit to the offense of attempted murder. J.A. 22. Indeed, even the prosecutor observed during the sentencing hearing that Mr. Braxton "continues to maintain he never intended to hurt anyone or kill anyone; he merely wanted them to go away." J.A. 62. Braxton himself specifically stated that he "was not trying to kill the marshals, harm the marshals." J.A. 76.

The government seeks to avoid the record on lack of intent by asserting that "callous and wanton disregard of the consequences to the marshals' lives" suffices to establish the requisite mental state for attempted murder. Brief for United States at 14 n.7. This assertion is meritless.[1]

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[1] The government's sole support for its claim that recklessness establishes the mental state required by 18 U.S.C. section 1114 is a Fifth Circuit decision interpreting a different statute. *United States v. Shaw*, 701 F.2d 367, 392-394 n.20 (5th Cir. 1981), *cert. denied*, 465 U.S. 1067 (1984). *Shaw* deals with a prosecution under 18 U.S.C. section 1113, not section 1114.

Congress rejected the position now taken by the government when it enacted the attempt provision of 18 U.S.C. section 1114. Although the terms of the statute do not specify the requisite mental state,[2] its legislative history clearly establishes that the offense of attempted murder includes the element of specific intent to kill. Congress added the attempt provision to section 1114 of title 18 in 1984.[3] The Senate Report accompanying the amendment explains that "[t]o constitute an attempt under this section, *the defendant must engage in conduct with the intention of killing the victim* and the conduct must constitute a substantial step toward the killing." S. Rep. No. 225, 98th Cong., 2d Sess. 328 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3504 (emphasis supplied). This language plainly refutes the government's assertion that recklessness is a sufficient mental state under 18 U.S.C. section 1114.[4]

[2] The indictment failed to allege the degree of attempted murder or the mental state necessary for the offense. J.A. 2.

[3] Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 2142. The amendment inserted "or attempts to kill" after "kills" in 18 U.S.C. section 1114 and set forth a maximum term of imprisonment of twenty years under the statute for any person found guilty of attempted murder.

[4] Even if proof of recklessness were sufficient for a conviction of attempted murder, the facts proffered at the Rule 11 hearing in support of Mr. Braxton's plea to assault on federal officers still fall short of conclusively establishing the mental state for attempted murder. At most, the proffer set forth facts which, if proved, would permit—but would not require—a trier of fact to draw an inference regarding Mr. Braxton's mental state at the time of the crime. The need for the trier of fact to make an assumption regarding Mr. Braxton's mental state to establish a necessary ingredient of the more serious offense of attempted murder negates the government's claim that the factual proffer "specifically established all the elements of attempted murder." Brief for United States at 18.

The factual proffer offered in support of the guilty plea to assault fails to establish that Mr. Braxton intended to kill the marshals, and the government has not asserted otherwise. As explained *supra* at page two, Mr. Braxton has consistently maintained that he lacked the requisite mental state for the crime of attempted murder.

If Mr. Braxton had been tried for attempted murder before being sentenced for it, he could well have presented a defense based on the element of intent—without contesting any of the facts proffered by the government during the Rule 11 hearing. The government's proffer that Mr. Braxton fired shots and shouted threats to kill the officers is perfectly consistent with his explanation that he intended only to frighten the marshals and not to harm them.[5]

One could, of course, choose to discount Mr. Braxton's explanation of his own state of mind and infer the required intent to kill from the facts he acknowledged as true. The dispositive point, though, is that the element of intent can be satisfied only by drawing inferences from part of the record and discrediting the rest. It twists the term "stipulation" beyond recognition to apply it to a construction of inferences that directly contradicts the defendant's express denials made to qualify the government's proffer. *See Rice v. Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985) (a stipulation requires mutual assent and binds parties only to terms actually agreed upon).

Because the factual proffer does not conclusively establish attempted murder, the policy argument that Mr. Braxton should be sentenced for his "real conduct" based on his acknowledgment of the proffer has no bearing on this case. As the government concedes, the Sentencing

[5] Contrary to the government's assertion (Brief for United States at 14), Mr. Braxton never said that he was trying to kill the marshals. He said that he fired the handgun because he did not want to return to Saint Elizabeths Hospital. J.A. 18.

Commission rejected a real offense system for many sound reasons, including the lack of any "way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process." Brief for United States at 13 & n.6, quoting United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A, ¶ 4(a), at 1.4-1.5 (1990). The Commission concluded that a pure or modified real offense system "threatened to work considerable unfairness." *Guidelines Manual*, Ch. 1, Pt. A, ¶ 4 (a) at 1.5.[6] The stipulation provision contained in section 1B1.2 was designed as a narrow exception to the Sentencing Commission's adoption of a charge offense system in which the applicable guideline is based on the offense of conviction. In the absence of a defendant's stipulation to conduct that satisfies all of the elements of a more serious offense than the offense of conviction, the general rule that the offense level is based on the offense of conviction applies.

II. THE GOVERNMENT'S BROAD CONSTRUCTION OF THE TERM "STIPULATION" CONFLICTS WITH THE INTENT OF CONGRESS AND THE SENTENCING COMMISSION

The government's proposed construction of the term "stipulation" also conflicts with the intent of the Sentencing Commission. The government argues that this Court should ignore the Sentencing Commission's express reliance on a portion of the House of Representatives Report which indicates that facts establishing guilt of a more serious offense may be considered only "if stipulated as part of a plea agreement." H. Rep. No. 1017,

[6] *Cf.* Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 772 (1980) (real offense system would be unsound and would distort the criminal justice system because of problems of fairness, procedural efficiency, and the impact on plea negotiations); Am. Bar Ass'n, Standards for Criminal Justice, Std. 18-3.1, Commentary at 214-217 (2d ed. 1980) (generally rejecting real offense sentencing guidelines).

98th Cong., 2d Sess. 99 (1984). Because the Senate bill was enacted, the government contends that the House Report is irrelevant. Brief for United States at 22. The history of the Sentencing Reform Act refutes this contention.

Congress did enact the Senate bill, not the House bill, on sentencing reform. Nevertheless, as this Court has already recognized, the House Report "reveals that the Senate's rationale underlying sentencing reform was shared in the House." *Mistretta v. United States*, 488 U.S. 361, 366 n.3 (1989). Furthermore, Congress left the Commission discretion to resolve the issue presented by this case. The Commission resolved the issue by adopting the view set forth in the House Report. As the Commission explained:

> Where a stipulation as part of a plea of guilty or *nolo contendere* specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. * * * For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

U.S.S.G. section 1B1.2, comment. (n.1).[7] By employing the language of the House Report, and citing directly to the Report, the Sentencing Commission expressly adopted this portion of the House Report. Moreover, according to the chairman and the general counsel of the Sentencing Commission, the stipulation provision in section 1B1.2 adopts the position in the House Report. Wilkins & Steer,

[7] This comment, like others, was officially promulgated for the express purpose of guiding interpretation of the sentencing guidelines. U.S.S.G. section 1B1.7, comment.

Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 501 (1990).[8] Thus, the history of section 1B1.2 indicates that its reach should be limited to cases in which a defendant admits the elements of the more serious offense as part of a plea agreement.[9]

III. THE GOVERNMENT PROPOSES UNWORKABLE PROCEDURES THAT A DEFENDANT MUST FOLLOW TO AVOID ENTERING INTO A STIPULATION

The government's broad construction of the term "stipulation" would force a defendant to employ drastic and impractical procedures to avoid entering into a stipulation. The government insists that a defendant who wishes to avoid the effect of a stipulation to a more serious offense must effectively deny *all* unlawful conduct. Brief for United States at 27-28. The government's brief offers no authority applying its view.

The most telling aspect of the government's brief is that it omits any discussion of Mr. Braxton's express refusal to enter into a stipulation to attempted murder. At the Rule 11 hearing, Mr. Braxton's counsel explained that Braxton "admits he assaulted someone and used a handgun, but, obviously, is not admitting he attempted to specifically murder anyone." J.A. 22. Mr. Braxton objected to the presentence report on the basis that he had not stipulated to attempted murder (J.A. 43-44),

[8] The Commission recently proposed a clarifying amendment to section 1B1.2 which would state expressly that a stipulation to a more serious offense must be part of a formal plea agreement. 56 Fed. Reg. 1891 (Jan. 17, 1990).

[9] The government concedes that the wording of section 1B1.2 "may not be ideal." Brief for United States at 19. Limiting the reach of guideline section 1B1.2 to cases involving negotiated plea agreements would comport with the rule of lenity—that criminal sentencing provisions are to be construed in favor of the accused. *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978).

and emphatically stated at sentencing that he was not trying to harm the marshals. J.A. 76. Not satisfied with these efforts, the government would require a defendant to deny all criminal conduct in order to ensure that he has not stipulated to a more serious offense under guideline section 1B1.2.

The Sentencing Commission clearly did not intend to delegate to prosecutors alone the discretion to decide whether and when a stipulation has been made.[10] Yet this would be the effect of the government's broad construction of "stipulation," which renders irrelevant Mr. Braxton's express refusals to admit attempted murder (J.A. 22 & 76), his objections to the presentence report (J.A. 43-44), and the district court's finding that "there's been no stipulation to Attempted Murder, and the record's clear on that." J.A. 77.

The government's proposal would fundamentally reshape the process of guilty pleas. The government suggests that Mr. Braxton could have avoided a stipulation to attempted murder by denying the factual proffer made by the prosecutor in support of his guilty plea to assault on federal officers and use of a handgun. The denial the government demands would be equivalent to a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *Alford* pleas involve more complex procedures than ordinary guilty pleas and they are not generally favored. *United States v. Punch*, 709 F.2d 889, 895 n.12 (5th Cir. 1983); Fed. R. Crim. P. 11 advisory committee's note to 1974 amends.

Furthermore, as the government concedes, a defendant's blanket denial of criminal conduct would preclude a two-level decrease in the offense level for acceptance of responsibility under guideline section 3E1.1 for the

[10] There was no mention of a stipulation at the Rule 11 hearing. The dispute over the applicable guideline under section 1B1.2 first arose when the government argued to the probation office that Mr. Braxton had stipulated to a more serious offense. J.A. 31.

crime to which he pleads guilty. As a result, the defendant's sentencing range would be higher than if he had acknowledged his conduct. Under these circumstances, a defendant has nothing to gain by pleading guilty to any offense.

The government's proposal thus imputes to the Sentencing Commission an intent to impose heavy burdens on courts and draconian consequences on defendants who are prepared to plead guilty to one offense but are not willing to be punished without trial for another, more serious one. In contrast, the correct approach advanced by Mr. Braxton would allow the accused to plead guilty under normal procedures to those crimes he committed, and to acknowledge the behavior constituting those crimes, without risking enhanced punishment under the stipulation provision of section 1B1.2 for different crimes with essential elements that remain in dispute.

As Mr. Braxton explained in his opening brief, the Commission contemplated that in a case involving the stipulation rule of guideline section 1B1.2,

> the Government agrees to forego prosecution of a more serious charge in exchange for gaining application of the guideline applicable to the more serious charge. The defendant agrees to the use of that guideline in exchange for limiting his statutory exposure and, perhaps, avoiding other guideline and statutory consequences.

Wilkins & Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C.L. Rev. 495, 501 (1990) (citations omitted). When a stipulation results from a negotiated plea agreement, the defendant is punished for the more serious offense and receives a promise that the government will forego prosecution of that charge. He does so, however, knowingly and voluntarily with an awareness of the existence and effect of the stipulation.

Mr. Braxton elected to risk trial on attempted murder rather than stipulate to a base offense level higher than that applicable to assault on federal officers. Having expressly rejected a stipulation, Mr. Braxton should not now be forced to suffer its consequences. The unfairness of a system in which a defendant is subjected to enhanced punishment based on a stipulation found to exist in the absence of his consent cannot be tolerated. For all of the reasons stated above, this Court should hold that a section 1B1.2 stipulation to a more serious offense can only be made when the defendant admits the elements of the more serious offense as part of a plea agreement.

— CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Braxton's opening brief, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case should be remanded for resentencing in conformity with Sentencing Guideline section 1B1.2.

Respectfully submitted,

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